UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

RED ROCK RIDING STABLES, INC.
Respondent

and **Case 28-CA-149983**

ERNEST W. LOVE, an Individual
Charging Party

Nathan A. Higley, Esq., for the General Counsel.
James Nelson, Esq. **and** ***Tyler Andrews, Esq.,***
(Greenberg Traurig LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on October 6, 2015, in Las Vegas, Nevada. Ernest W. Love filed a charge on April 13, 2015, alleging violations by Red Rock Riding Stables, Inc. (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, including the posthearing briefs and based upon the detailed findings and analysis below, I conclude that Respondent did not violate the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that:

1. (a) At all material times, Respondent has been a Nevada corporation, with an office and place of business in Blue Diamond, Nevada (Respondent's facility), and has been engaged in the business the operation of an amusement park and restaurant.

(b) In conducting its operations during the 12-month period ending April 13, 2015, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of Arizona.[1]

(c) In conducting its operations during the 12-month period ending April 13, 2015, 2013, Respondent derived gross revenues in excess of $500,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Alan Levinson	-	President and Director
April Hopper	-	Secretary Treasurer
Kris Kessler	-	Barn (Stables) Manager

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Red Rock Riding Stables, Inc., is a family-owned horse boarding and outdoor horse riding facility which was passed down from the parents to the children. The day-to-day operations of the facility are run by brother and sister Alan Levinson and April Hopper. (Tr. 155.) The boarding service component provides a boarding service in which horses that are not owned by Respondent are housed and cared for. (Tr. 72.) The riding component offers guided trail rides to members of the public. (GC Exhs. 6-11; Tr. 72.) Ernest W. Love was employed as a wrangler at Respondent's facility. He began his employment in July 2012, and worked until March 15, 2015. The duties of a wrangler included providing horseback trail rides through the Red Rock Canyon area, feeding and caring for the horses, cleaning the horse stalls, and making necessary repairs. (Tr. 23:15-21.) All of the horses used during the trail rides are owned by Respondent. Since its inception, Respondent maintained an official policy which precludes all

[1] Respondent admitted as much in its answer to par. 2f of the complaint but also raised lack of jurisdiction as an affirmative defense. (GC Ex. 1G.) Respondent thereafter argued that the Board was without jurisdiction because at trial there was an insufficient showing that Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Nevada. (R. Br. at 8-10.) In the face of Respondent's admission and its failure to amend its answer, I find the admission is binding upon Respondent despite the conflict with its later assertion that the General Counsel failed to establish jurisdiction. The Board has generally held that even if post pleading evidence conflicts with admissions in pleadings, admissions in pleadings are binding on the parties. See for example *Boydston Electric, Inc.,* 331 NLRB 1450 (2000). Nevertheless, Respondent stipulated at hearing that it received gross annual revenues in excess of $500,000 sufficient to establish jurisdiction for a retail establishment. *Greenlawn Funeral Home*, 249 NLRB 1067 (1980).

wranglers, employees, or guests from wearing spurs while riding Red Rock horses on its trail rides. (Tr. 156:11-12.) When Love first became employed in 2012, he was informed of the no spurs policy by Kris Kessel the stables manager. Although this policy has been in place since Red Rock Riding Stable's inception, the policy has not been consistently enforced. (Tr. 91.)

B. Ernest Love's use of Spurs

Ernest W. Love is a longtime horseman and cowboy who has been riding horses "for as long as he can remember." (Tr. 102.) For as long as he has ridden, he has worn spurs. A spur is a U-shaped device which attaches to the heel of the rider's boots and is used by applying pressure with the metal device to the sides of the horse. The purpose of the device is to manage the movement of the horse. For example, when used for a proper purpose, spurs might be used to get the horse to avoid cactus, to train a horse to back up and stop, or to convince a recalcitrant or stubborn horse to leave the barn. (Tr. 51, 104-105.) The type of spurs worn by Love were a standard spur with a small metal disc on the end. His preference for spurs revolved not only around their utility as a device to help to coax and manage the horse's movement but also because it was a standard part of what he considered his cowboy outfit. Spurs are for Love as much a part of his professional riding gear as they are a part of his everyday cowboy attire. In fact, he often wore spurs even when he was not riding horses. (Tr. 106.).[2]

C. The Events of March 15, 2015

On or about March 15, 2015, Levison, Hopper, and Kessel were in a pen attending to a dying horse. As the horse lay on the ground, a group of riders escorted by Love was coming in from a trail ride. Hopper looked up and noticed that the horse Ernest Love was riding was dancing all over with its head high. (Tr. 158.) She immediately noticed that Love was wearing spurs and using them to make the horse dance. (Tr. 159.) She asked her brother Alan if he had authorized the use of spurs. He told her no and then she immediately instructed Kessel to advise the riders that they were not authorized to use spurs on the horses. (Tr. 159.) Kessel, as instructed, notified the wranglers Ernest Love, Robbie Franks, and Milo Pierson, first by announcing "no more spurs." All three riders in unison said, "[I]t was a bunch of bullshit." (Tr. 109.) Love sometime thereafter hollered across to the pony pen and said he couldn't work without his tools and refused to take the 4:30 p.m. ride. Kessel told him that he could take an early out and go home and think about it over the weekend. Ernie's response "was very offensive regarding how he felt about Red Rock Riding Stables and said lots of expletives and that he was packing his gear and was done with this kind of establishment." (R. Exh. 1.)

After the "no more spurs announcement," Franks spoke with Love and Pierson (the other two wranglers) and told them, "[I]f I can't wear my spurs, I am going to quit my job and leave here and they both agreed. They said, "[Y]eah if we can't wear our spurs, were not going to work here either." (Tr. 59.) Kessel spoke individually with Franks (who was often referred to simply as Robbie), then Ernest Love, and Milo Pierson. She approached Franks in the tack room sometime prior to 3:15 p.m. on March 15, 2015. She told him, "[W]e are no longer wearing spurs anymore you can wear it (sic) on your own horses. " (Tr. 76.) He was upset about the "no spurs" rule and immediately went to speak with Levinson and Hopper about the matter. He

[2] Love testified, "I sometimes go to the grocery store with my spurs on." (Tr. 106.)

asked them if the rule applied to him even if he had been wearing spurs for 2 years and nobody ever said anything to him about it. They replied that in fact the rule did apply to him despite the fact that he had been wearing spurs in the past. He told them, "[W]ell I feel a little different about that, I feel like if I can't wear my spurs then I don't want to stay here and work. " (Tr. 55.) He then shook hands and decided to quit "but with no hard feelings." (Tr. 55.) After learning that Franks intended to quit, Kessel asked him to reconsider but his mind was made up and he loaded up his things and left. (Tr. 55.)

Kessel thereafter spoke again with Love outside of the tack room. She told him to just take the spurs off for an hour and he could wear them at all other times when he wasn't riding. (Tr. 76.) He became enraged, began cursing and said, "[W]ell you can go 'blank' yourself. And this place can go 'blank' itself. And I'm packing my 'blank and blanking' out of here." (Tr. 77.) Kessel asked if he was sure about his decision to quit and he said, "[E]xpletive, expletive . . . I'm out of here." (R. Exh. 1.)

Kessel next informed the third wrangler, Milo Pierson, about the policy. He was a bit more cordial than the other two wranglers when informed of the rule change and took two more rides that day. At the end of the day, he even helped Kessel close the ranch. He nevertheless also quit and did not return to work. (Tr. 78.)

D. Credibility Determinations

What happened after Kessel notified the wranglers is dependent entirely on whose version of events is credited. Love testified that "I probably said it was a bunch of crap or a bunch of bull crap or something I am sure. But I just went and unsaddled my horse." I told Chris. She asked me. She said, "[A]re you leaving too? I said no. I said: I'm going to unsaddle my horse. If I can't wear spurs, then I will feed. I will clean stalls, I will do everything but I am not going to ride. She said: Well you might as well go too. And that was the last I heard of it." (Tr. 110:10-20.) While his testimony is somewhat consistent with Kessel's version there is disagreement regarding whether she told him to leave or whether he left on his own accord.[3]

After observing the demeanor and testimony of Levinson and Hopper, I credit their testimony as being truthful. Their calm demeanor and the sincerity with which they both testified convinced me that their testimony was truthful. I also credit Kessel's testimony as truthful, and specifically credit her testimony regarding the most important issue, whether Love quit or was discharged.[4] Love's testimony at trial revealed what can best be described as

[3] It should be noted that Love filed a claim for unemployment compensation with the Nevada Department of Employment Training and Rehabilitation. His initial claim for benefits was denied noting that "although a discharge is cited, it is determined you quit for personal reasons." The decision itself noted, "you advised at filing that you were discharged by 'mutual agreement.'" (R. Exh. 4.) On appeal, the decision was overturned based upon the finding that Kessel specifically told claimant to leave, a finding that I specifically reject. (GC Exh. 14a.) See *Cardiovascular Consultants of Nevada*, 323 NLRB 67 (1997), and *Whitesville Mill Services Co*., 307 NLRB 937 (1992) (holding unemployment compensation decisions are admissible but not controlling).

[4] The General Counsel argues in its brief that Kessel's testimony lacked credibility. (GC Br. at 24-26.) I disagree. Kessel is a stable manager whose expertise is in the riding and care of horses. It was clear from my observations that she is not an experienced trial witness. Nevertheless, I found that her

restrained anger. His tone and demeanor suggested that he was still angry about the no spurs policy and took great personal offense to having been told that he could not wear spurs. His testimony also lacked candor. His version of what transpired skipped over "the event" which was the whole catalyst for the discussion about the use of spurs. What he, conveniently, skipped over was that after the trail ride was finished on March 15, 2015, he used his spurs for the improper purpose of making the horse rear up and dance, presumably to impress the guests who he was guiding that day.

His testimony was also directly contradicted by Franks, who testified that all three wranglers agreed to quit. (Tr. 59.) Kessel testified that she asked Franks to reconsider and asked him if he was sure about his decision. Franks corroborated this testimony. In a similar vein, Kessel offered, as a reasonable alternative for Love, to simply take the spurs off for an hour which would allow him to wear his spurs, at all times, when not riding. (Tr. 76.) She also offered to have him take part of the day off and think about his decision and went to the tack room to again ask him if he was sure about "his decision." (R. Exh. 1.) This is significant because Kessel's attempts to offer employees the opportunity to reconsider "their decisions" are simply inconsistent with the action of someone who is making the decisions for them and terminating them. Absent from the record is any termination document and/or memorandum advising Love that he was "terminated." [5]The only post termination document that appears in the record is the document which records Kessel asking Love whether he was sure about "his decision" to quit. (R. Exh. 1.)

I find that the totality of the evidence supports the notion that all of the wranglers quit in protest of the no spurs rule and none were discharged. The horses that were ridden daily were trail horses and none of them required the use of spurs. (Tr. 31.) The horses were well trained, walked the same trail every day, and could walk the trail on their own by simply putting the reins on the saddle horn. (Tr. 31.) All of the wranglers and especially an experienced wrangler like Love knew that riding these particular horses did not require the use of spurs. Love himself testified that despite daily rides he actually only used his spurs "four or five times the whole time" he was there. (Tr. 104.) Nevertheless, despite the fact that the use of spurs was not necessary, Franks and Pierson both admittedly quit because of it. A reasonable inference to be

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honesty and candor was readily apparent. For example, she candidly admitted that she was the one who allowed the wranglers to wear spurs despite the fact that it was against company policy to do so. As uncomfortable as it was for her to admit her role in the wrangler's use of spurs she did so freely. This and her general demeanor convinced me that she made every effort to provide testimony that was truthful to the best of her recollection.

[5] It is important to note that an employer's statements or actions that reasonably lead an employee to believe that he or she has been terminated can be sufficient to establish a discharge even in the absence of any formal discharge notice. See for example *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 10 (2014), citing *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). If Love's testimony regarding Kessel's statements had been credited as truthful, applying the standards referenced in *Don Chavas* would no doubt lead to the conclusion that Love was discharged. Given this fact, I am mindful of the importance of the credibility determinations to the outcome of the case and as a result my deliberations regarding credibility have been both thoughtful and careful.

drawn from this evidence is that the decision to quit transcended mere employment considerations regarding whether spurs were required to do the job. Inextricably intertwined with the decision to quit were the wranglers' views regarding cowboy personal and professional independence. It is clear from the evidence of record and from Love's angry demeanor that he felt strongly about being told he could not wear spurs. The totality of the evidence supports the conclusion that Love and Pierson both followed Franks' lead and also quit.

E. Analysis

Section 7 of the Act protects the rights of employees to engage in concerted activities for the purposes of mutual aid or protection. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

The General Counsel argues that since (in its view) the Charging Party was discharged, the principles enunciated by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989(1982), establish that the discharge was in fact unlawful. (See GC Br. at 35.)

To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12.

Paragraph 4(b) of the complaint alleges that Love was discharged. The preponderance of the evidence, however, established that when Love was unable to set his own terms and conditions of employment, he simply quit and was not discharged by the employer.[6] What is

[6] Love reaffirmed his desire to set his own terms and conditions of employment when he testified at trial that he would not return to work at Red Rock unless he could wear his spurs while riding horses. (Tr. 126-127.)

missing is the necessary element of the employer taking action against Love. Without proof of employer action against Love, the most basic element of the *Wright Line* prima facie case is not established. Thus, in failing to prove that Love was discharged, the General Counsel failed to prove an essential element of its case.

It deserves mention that the Board has found violations of the Act in factual situations where the employee quits and is not openly discharged. Those cases find that an employee resignation is considered to be a discharge because of the circumstances surrounding the resignation. The Board has held that a constructive discharge occurs despite an employee's resignation when it can be shown that (1) the employer established burdensome working conditions sufficient to cause the employee to resign and (2) the burden was imposed on the employee because of his or her protected activities. *Manufacturing Services*, 295 NLRB 254, 255 (1989); *Algreco Sportswear Co*., 271 NLRB 499, 500 (1984); *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976).

Applying constructive discharge analysis to the facts of this case yields the same results as the traditional discharge analysis. There simply is no evidence in the record from which to conclude that the "no spurs rule" changed the working conditions in a manner that made them so burdensome that the employee would have been compelled to resign. This is especially true given the fact, as noted above, that none of the horses required the use of spurs.[7] Therefore, I find that even the first element of the constructive discharge analysis is not met.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 23, 2015

Dickie Montemayor
Administrative Law Judge

[7] The horse ridden by Love was named "Nitro." Although the name itself conjures up images of an explosive, untamable stallion there was no evidence to establish that "Nitro" was unmanageable and/or otherwise required the use of spurs to ride.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.